IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BRANDON SCOTT HOLLOWAY,
Appellant.

No. 2 CA-CR 2015-0072
Filed April 4, 2016

Appeal from the Superior Court in Pima County
No. CR20135372001
The Honorable Carmine Cornelio, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Jonathan Bass, Assistant Attorney General, Tucson
Counsel for Appellee

The Law Offices of Stephanie K. Bond, P.C., Tucson
By Stephanie K. Bond
Counsel for Appellant

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S T A R I N G, Judge:

¶1 After a jury trial, Brandon Scott Holloway was convicted of assault, sexual assault, aggravated assault with a dangerous instrument, and kidnapping. Holloway asserts errors related to evidentiary rulings, prosecutorial misconduct, a non-unanimous jury verdict for assault, and insufficient evidence that the sexual assault involved serious physical injury. We affirm his convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming Holloway's convictions and sentences. *See State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). On October 25, 2013, Holloway entered K.T.'s apartment without being invited. K.T. recognized him from previous meetings. Holloway brought with him numerous belongings, including a bike, several bags full of clothes and other items, a gun, and a pair of bolt cutters. When K.T. asked him to leave, Holloway pushed her to the floor, and lay on top of her while wrapping his arms around her head. He promised to stop if she did not make noise, but repeatedly slammed her head to the floor and squeezed her entire body when she gasped for breath. Holloway then raped K.T.

¶3 Throughout the ordeal, Holloway repeatedly lunged at K.T. and slammed her against the floor, breaking her dentures. He also threatened and mocked her and, at one point, swung a pair of bolt cutters at her. She tried to escape twice, but Holloway slammed her hand in the door, causing her to suffer permanent disfigurement. K.T. feared for her life.

¶4 After raping K.T., Holloway poured a glass of lemonade over her head, and forced her to take a bath; he cleaned blood off the walls and floor and then entered the bath and forced her to bathe him. Several hours later, Holloway left the apartment, taking K.T.'s key and locking her inside. He promised to return later and left a note saying he would return that night. K.T. waited ten minutes to be sure Holloway was gone before escaping through a window and seeking help from her neighbor, who contacted the police.

¶5 K.T. provided Holloway's description to the police, identified him by first name, and ultimately identified him in two photographs the police obtained from a photo album Holloway had left in K.T.'s bathroom. Police used the photographs to make two information flyers that ultimately led to Holloway's arrest.

¶6 Detective Robert Dobell interviewed Holloway early the morning of December 16. A redacted video of the interview was shown to the jury at trial, in which Holloway denied knowing K.T. by her legal name. He claimed ignorance even when Dobell suggested consensual sex and mentioned key details such as bathing together and the deadbolt on K.T.'s apartment door that could only be unlocked using a key from the outside. Dobell repeatedly identified the geographic area using street names, and Holloway denied having been there in the past two months, even though he had lived in the area before.

¶7 At trial, Holloway testified he had paid K.T. in money and vodka for consensual sex on the day in question, and on previous occasions. He maintained K.T. called him later claiming a man known only by the nickname LA "was going to kick her ass" because "she smoked the last of the meth[amphetamine]," that during the call LA threatened both Holloway and K.T., and that he overheard "banging in the background and arguing and fighting and . . . [K.T.] screaming and crying." He further claimed an album containing his photographs, found in K.T.'s bathroom, had been stolen by another woman, who was evicted from a nearby apartment, and whose belongings, including his album, "ended up at" K.T.'s apartment.

¶8 The jury found Holloway guilty on all four counts, as described above, and found the sexual assault involved the knowing or intentional infliction of serious injury. The trial court sentenced Holloway to concurrent sentences, the longest being life without the possibility of release for twenty-five years. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Exclusion of Victim Character Evidence

¶9 Holloway argues the trial court improperly excluded several items of evidence pursuant to Arizona's rape shield law, A.R.S. § 13-1421: two Tucson Police Department reports concerning K.T.'s claims to have been raped by other men in April 2011 and March 2012; statements by a neighbor, D.V., about K.T.'s alcohol and drug use and his speculation that she engaged in prostitution; statements by another neighbor, C.S., about K.T.'s prostitution; a police report and associated criminal case in which K.T. was arrested for agreeing to perform a sex act with an undercover officer in exchange for vodka; evidence from a lab report indicating that K.T.'s vaginal aspirate contained DNA[1] from at least one person other than her and Holloway; statements from still another neighbor, M.P., concerning K.T.'s prostitution, drug use, and association with LA; statements K.T. made to a forensic examiner about having had sex in the past 120 hours but being unable to recall specifics or whether contraception was used; and cross-examination of K.T. about her prostitution, prior exchanges of alcohol for sex, and association with LA. Holloway contends excluding the evidence violated his constitutional right to present a complete defense, including that the sex was consensual and that LA was the source of K.T.'s injuries. He also contends the court misapplied the rape shield statute by not engaging in a balancing test, and that evidence of K.T.'s prostitution was admissible character evidence under Ariz. R. Evid. 404(a)(2).

[1]Deoxyribonucleic acid.

¶10 Ordinarily, we review a trial court's decisions concerning the admissibility of evidence for abuse of discretion. *State v. Hensley*, 142 Ariz. 598, 602, 691 P.2d 689, 693 (1984). However, we review constitutional issues de novo. *State v. Guarino*, 238 Ariz. 437, ¶ 5, 362 P.3d 484, 486 (2015).

¶11 Arizona's rape shield law is "intended to protect victims of rape from being exposed at trial to harassing or irrelevant questions concerning any past sexual behavior." *State v. Gilfillan*, 196 Ariz. 396, ¶ 15, 998 P.2d 1069, 1073-74 (App. 2000). The statute's "provisions generally prohibit a criminal defendant from introducing at trial evidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity." *Id.* ¶ 16. And, although § 13-1421(A) provides specific exceptions,[2] the statute provides that evidence offered subject to the exceptions "may be admitted only if a judge finds the evidence is relevant and is material to a fact in issue in the case and that the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence." A.R.S. § 13-1421(A); *see also State ex rel. Montgomery v. Duncan*, 228 Ariz. 514, ¶ 7, 269 P.3d 690, 692 (App. 2011) ("A finding of relevancy alone does not act to trump victim's rights."). In addition, a defendant must prove the existence of an exception "by clear and convincing evidence." A.R.S. § 13-1421(B); *Gilfillan*, 196 Ariz. 396, ¶ 16, 998 P.2d at 1074.

¶12 In *Gilfillan*, we rejected the assertion that the rape shield law precluded the defendant from presenting a complete defense, and we upheld the constitutionality of the statute. 196 Ariz. 396,

---

[2]The statutory exceptions provided in A.R.S. § 13-1421(A)(1)–(5) are: (1) evidence of the victim's past sexual conduct with the defendant; (2) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or trauma; (3) evidence supporting a claim that the victim has a motive in accusing the defendant; (4) evidence offered for impeachment purposes when the prosecutor puts the victim's prior sexual conduct in issue; (5) evidence of false allegations of sexual misconduct made by the victim against others.

¶¶ 17-23, 998 P.2d at 1074-76. "Given that 'the constitutionality of such a law as applied to preclude particular exculpatory evidence remains subject to examination on a case by case basis,'" we concluded "the restrictions delineated in the Arizona Rape Shield Law are not disproportionate to the purpose the rape shield statute serves." *Id.* ¶ 23, *quoting Sandoval v. Acevedo*, 996 F.2d 145, 149 (7th Cir. 1993). The statute "provides procedural safeguards to reduce inaccuracies and prejudicial evidence, rather than an arbitrary and unconstitutional *per se* exclusion." *Id.* ¶ 23.[3] Thus, although the facial constitutionality of § 13-1421 has been upheld, it is subject to as-applied challenges. *Id.* ¶¶ 19-23. Holloway has not, however, cited any such challenges that have been successful.

¶13 Notably, the cases cited in *Gilfillan*, illustrating circumstances in which rape shield laws in other jurisdictions have been improperly applied, are easily distinguished from Holloway's case. *See id.* ¶ 22. In *United States v. Bear Stops*, 997 F.2d 451, 454 (8th Cir. 1993), a six-year-old sexual assault victim was assaulted by three older boys around the same time as the alleged assault by the adult defendant. The defendant sought to introduce evidence of the boys' assault to establish an alternative cause of the victim's bloody underwear and an alternative explanation for why the victim exhibited the behavioral characteristics of an abused child. *Id.* at 453-54. The Eighth Circuit noted it was possible to avoid "intrusion on [the victim's] privacy" by introducing the basic details by stipulation or through the victim's mother. *Id.* at 457. The court concluded it was reversible error to preclude "the basic factual details" of the assault under those circumstances. *Id.* at 457-58.

¶14 In *Olden v. Kentucky*, 488 U.S. 227, 229-30 (1988), evidence of a married white victim's extramarital interracial cohabitation was offered by the defendant to support his theory that

[3]The rape shield statute "mandates that there be a hearing on written motions to determine the admissibility of the evidence of the alleged rape victim's chastity." *Gilfillan*, 196 Ariz. 396, ¶ 22, 998 P.2d at 1076; A.R.S. § 13-1421(B) (also imposing the clear and convincing evidentiary burden).

the victim had consensual sex with him but later claimed she was raped in order to protect her relationship with her boyfriend. The Court noted the potential of the excluded evidence to impeach two important witnesses, including the victim, whose testimony was "central, indeed crucial" to the state's objectively weak case, as well as the improper reliance on "[s]peculation as to the effect of jurors' racial biases" in determining that the trial court improperly excluded the evidence and that the error was not harmless. *Id.* at 232-33.

¶15 In contrast to the defendants in *Olden* and *Bear Stops*, the application of the rape shield statute did not impermissibly impede Holloway from presenting his defense. He was allowed to testify at length that he paid K.T. for sex on multiple occasions, and that on the day in question he received a call from K.T. in which he heard direct and indirect statements from both K.T. and LA about LA's threats to hurt K.T. because she "smoked the last of the meth[amphetamine]." The excluded evidence related to the argument that because K.T. had accepted vodka in exchange for sex with other men, she must have done so with Holloway. However, as the trial court observed: "The fact that the alleged victim may be a prostitute is not a defense to the charges and is not dispositive to the fact that she did or did not consent to the sexual activity with Holloway." Our supreme court has also observed the probative value of an assault victim's sexual history is minimal. *See State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 28-29, 545 P.2d 946, 952-53 (1976).[4]

[4] In dicta, the court envisioned possible exceptions to the inadmissibility of chastity evidence, including reputation for prostitution when there is an issue of actual consent to an act of prostitution. *State ex rel. Pope*, 113 Ariz. at 29, 545 P.2d at 953. As noted above, however, Holloway was allowed to testify at length concerning the fact he had paid K.T. for sex on prior occasions. Also, *State ex rel. Pope* pre-dated the enactment of Arizona's rape shield law, in which the legislature expressly articulated exceptions to exclusion. *See* 1998 Ariz. Sess. Laws, ch. 281, § 4.

¶16 The types of possible prejudice were also distinguishable, as Holloway was accusing K.T. of illegal activity. In *Olden*, 488 U.S. at 232, the trial court erroneously barred the introduction of evidence based largely on speculation the jury would be improperly influenced by racial bias. In *Bear Stops*, 997 F.2d at 457, there was no suggestion the unrelated assault by third parties had any potential to prejudice the jury against the child victim. The concern was about direct harm to the victim, easily avoided by introducing the details through another witness or by stipulation. *Id.* Here, in contrast, evidence of prostitution would tend to evoke moral condemnation among jurors, reinforced by current laws criminalizing prostitution. *E.g.*, A.R.S. § 13-3214. In this case, the excluded evidence of K.T.'s prostitution with other men was precisely the sort of inflammatory, prejudicial evidence concerning chastity the rape shield statute was intended to exclude.

¶17 As to Holloway's argument about the trial court's failure to conduct a balancing test, none was required under § 13-1421 because the court found none of the five statutory exceptions applied. In addition to the limited probative value with respect to Holloway's consent defense, K.T.'s sexual history had no tendency "to create a reasonable doubt as to the defendant's guilt" for the physical assault, *see State v. Gibson*, 202 Ariz. 321, ¶ 16, 44 P.3d 1001, 1004 (2002), and thus was not relevant to Holloway's third-party culpability defense. The court explicitly noted that K.T.'s prostitution with other men was not a defense to Holloway's charges, and was "not dispositive to the fact that she did or did not consent to sexual activity with Holloway." The court thus considered, as contemplated by *Duncan*, whether the excluded evidence had "'substantial probative value.'" 228 Ariz. 514, ¶ 5, 269 P.3d at 692, *quoting Gilfillan*, 196 Ariz. 396, ¶ 22, 998 P.2d at 1076. Under any balancing test in this case, the danger of unfair prejudice outweighs the limited probative value of the evidence.

¶18 Likewise, we reject Holloway's contention that evidence of K.T.'s prostitution was admissible as a permissible character trait pursuant to Ariz. R. Evid. 404(a)(2). The trial court noted that neither Holloway nor the court had found any authority for the proposition that being a prostitute is a character trait as

contemplated by that rule. Holloway has not cited any such authority to this court. And we note that allowing such evidence under Rule 404(a)(2) would have the effect of routinely allowing the very sort of chastity evidence that Arizona's rape shield statute was intended to exclude.

¶19 Moreover, we reject Holloway's argument that he was prejudiced by the exclusion of evidence that may have "corroborated [his] testimony." Holloway's testimony was contradicted by his own claims in the post-arrest interview denying all key details about the assault and even being present in the geographical area during the relevant time period.

¶20 The proffered evidence concerning K.T.'s alleged prostitution and substance abuse was properly excluded under Arizona's rape shield law.

Confrontation

¶21 Holloway claims the trial court improperly limited his cross-examination of K.T., lab technician Christian Wilson, forensic examiner Diane Kerrihard, and neighbor D.V. in violation of his rights under the Confrontation Clause of the Sixth Amendment. With the exception of K.T.'s 2000 felony drug conviction, K.T.'s statements to Kerrihard about other sexual partners within five days of the incident, the DNA evidence, and D.V.'s testimony, Holloway did not adequately preserve these claims by making a specific objection below. We review for harmless error those issues Holloway did raise below, and for fundamental error issues raised and adequately argued for the first time on appeal. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 18-19, 115 P.3d 601, 607 (2005); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989); *State v. Ruggiero*, 211 Ariz. 262, n.2, 120 P.3d 690, 695 n.2 (App. 2005) ("Generally an issue raised for the first time in a reply brief is waived.").

¶22 In limiting confrontation and cross-examination, trial courts have discretion to curtail the presentation of "cumulative evidence" and to otherwise "'determin[e] when the subject is exhausted.'" *State v. Thompson*, 108 Ariz. 500, 503, 502 P.2d 1319,

1322 (1972), *quoting Smith v. Illinois*, 390 U.S. 129, 132 (1968). Similarly, it is not reversible error to allow a witness to refuse to answer questions relating to "collateral matters or cumulative matters involving general credibility." *See State v. Dunlap*, 125 Ariz. 104, 106, 608 P.2d 41, 43 (1980). But a court violates a defendant's confrontation rights if it excludes otherwise admissible evidence that "bears either on the issues in the case or on the credibility of the witness." *State v. Fleming*, 117 Ariz. 122, 125, 571 P.2d 268, 271 (1977).

¶23 Here, the precluded evidence referred to in Holloway's appeal relates to either K.T.'s sexual history or her past drug use. Holloway has failed to meet his burden of showing, by clear and convincing evidence, that these matters are relevant with respect to the events that form the basis of his convictions, "and that the inflammatory or prejudicial nature of the evidence does not outweigh [its] probative value." A.R.S. § 13-1421(A), (B). Moreover, he seeks to rely on cumulative evidence of K.T.'s alleged prostitution, in order to support the tenuous assumption that K.T. must have engaged in prostitution with him, and therefore must have been violently assaulted by someone other than Holloway.[5] Given the cumulative and collateral nature of the evidence in question, we cannot say the court violated Holloway's confrontation rights or otherwise abused its discretion in excluding it. *See Dunlap*, 125 Ariz. at 106, 608 P.2d at 43.

Holloway's Photographs and Drug Use

¶24 Holloway claims the trial court erred by admitting four photographs that showed him with a bottle of whiskey, "inhaling an unknown substance," and with his tattoos visible, and by allowing the state to elicit references to his history of intravenous (IV) drug

[5]As noted above, Holloway was allowed to testify at length that he paid K.T. for sex on multiple occasions, and that on the day in question he received a call from K.T. in which he heard direct and indirect statements from both K.T. and LA about LA's threats to hurt K.T. because she "smoked the last of the meth[amphetamine]."

use. We review these evidentiary rulings for abuse of discretion. *Hensley*, 142 Ariz. at 602, 691 P.2d at 693.

Photographs

¶25 The trial court admitted the photographs over objection after finding they were relevant to show ownership of the album found in K.T.'s bathroom, and to otherwise illustrate how the police, with some assistance from K.T., were able to identify and locate Holloway. The court allowed Holloway to briefly re-cross the state's witness in order to clarify which photos were printed in the flyers used to locate Holloway and to establish that one of the photographs used by police had not been identified by K.T. Holloway claims he was prejudiced because the photographs showed him using alcohol and an "unknown substance" and "looking disrespectful" and "intoxicated."

¶26 Arizona courts have rejected claims of undue prejudice from evidence of a defendant's drug use. Our supreme court found no error in admitting a murder defendant's statements about plans to buy marijuana given "the gravity of the crime for which the defendant was on trial" and the fact that "the jury had been voir dired concerning their attitude toward drugs." *State v. Atwood*, 171 Ariz. 576, 619-20, 832 P.2d 593, 636-37 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, ¶ 20, 274 P.3d 509, 513 (2012). Photographic evidence is generally admissible if it helps the jury to understand any disputed issue, and its probative value outweighs any "danger of unfair prejudice" that may be caused by admission. *State v. Bailey*, 160 Ariz. 277, 280, 772 P.2d 1130, 1133 (1989). And, while it is prejudicial error to admit a mug shot of a defendant because it suggests a criminal record, *State v. Moore*, 108 Ariz. 215, 218-19, 495 P.2d 445, 448-49 (1972), Arizona courts have upheld the use of other types of photographs relevant to proving identity. *See State v. McCutcheon*, 162 Ariz. 54, 58, 781 P.2d 31, 35 (1989) ("mug shot" like photo); *State v. Sanchez*, 130 Ariz. 295, 300, 635 P.2d 1217, 1222 (App. 1981) (photos of tattoos reading "Hate Cops" and "Lonely Drifter").

¶27 The photographs of Holloway were relevant to proving his identity and ownership of the photo album found in K.T.'s apartment. In addition, Holloway has not demonstrated that the photographs depicted illegal activity or suggested a criminal record or other clearly prejudicial subject matter. And the record suggests the jury was questioned about their views on drug use during voir dire.

¶28 Holloway also protests that his appearance in the photographs varies from K.T.'s description of him, which included curly hair to the jaw line and no glasses. The fact K.T.'s description of her assailant did not match the photographs with respect to hair, hat, and glasses went to the weight of the evidence, not its admissibility. *See State v. Pereida*, 170 Ariz. 450, 454-55, 825 P.2d 975, 979-80 (App. 1992). It did not diminish the usefulness of the photographs to identify Holloway based on his other features. We therefore disagree with Holloway's claim that the pictures "had no value or result except to inflame the minds of the jurors." We find no error in the decision to admit them.

IV Drug Use

¶29 Holloway objects to the trial court's decision to allow the state to ask him if he had ever injected methamphetamine. He speculates the state did so to signal to the jury that he "is a 'bad man' who drugs women and then rapes them." He further claims that "the allegation . . . that Holloway was an IV drug user" was precluded by the court's motion in limine ruling.

¶30 At the motion hearing, Holloway's counsel clarified her concern with the following explanation: "If she's going to say they used drugs, that's fine. I just don't want her characterizing him as an IV user and a homeless guy." Accordingly, the court's ruling prohibited only the use of "colorable phrases" and "specific phraseology" such as "homeless" and "IV user."

¶31 At trial, K.T. testified that Holloway had asked her to lick the plunger of a syringe containing a clear substance. When Holloway testified, the state asked him about this incident and about his own drug use. During these exchanges, Holloway did not object

until the state asked if his former girlfriend would agree that he had never injected drugs.

¶32 Evidence of drug use became relevant in this case if for no other reason than the fact Holloway brought a syringe with him to K.T.'s apartment. Indeed, Holloway embraced the drug theme beginning with opening statements, when his counsel first referred to K.T.'s neighborhood as a "drug community" and mentioned K.T.'s drinking problem and probable use of methamphetamine to assail her credibility. Holloway made his own drug use specifically relevant when he claimed K.T. smoked methamphetamine twice on the day in question in an attempt to explain the empty baggie found in K.T.'s apartment, which he connected to his claim that LA assaulted her over the missing drugs, while claiming he himself only smoked marijuana. And, as noted above, Holloway's counsel stated there was no objection to limited references to his drug use.

¶33 We therefore reject Holloway's claim that his drug use was irrelevant to the trial, and that the jury might wrongfully conclude he "tried to drug K.T." Indeed, the latter would be a permissible inference from K.T.'s testimony about Holloway bringing a syringe and forcing her to lick the plunger. We find no error in the trial court's decision to allow brief references to Holloway's prior IV drug use.

Prosecutorial Misconduct

¶34 Holloway argues the trial court erred in denying his motion for mistrial for alleged prosecutorial misconduct. He also raises two alleged forms of misconduct that were not the subject of an objection below. A court's ruling on a motion for mistrial for alleged prosecutorial misconduct is reviewed for abuse of discretion. *State v. Hansen*, 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988). Failure to raise a contemporaneous objection subjects a claim only to fundamental error review. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶35 Prosecutorial misconduct is "'intentional conduct which the prosecutor knows to be improper and prejudicial'" and which "'is not merely the result of legal error, negligence, mistake, or

insignificant impropriety.'" *State v. Martinez*, 221 Ariz. 383, ¶ 36, 212 P.3d 75, 85 (App. 2009), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). Reversal for prosecutorial misconduct is warranted when misconduct "so permeated the trial that it probably affected the outcome and denied defendant his due process right to a fair trial." *State v. Blackman*, 201 Ariz. 527, ¶ 59, 38 P.3d 1192, 1206 (App. 2002). Misconduct is harmless if it is clear "'beyond a reasonable doubt that it did not contribute to or affect the verdict.'" *Id.* ¶ 59, *quoting State v. Towery*, 186 Ariz. 168, 185, 920 P.2d 290, 307 (1996).

Holloway's History of Domestic Violence

¶36 Holloway first claims the state deliberately attempted to elicit testimony about his 2008 domestic violence conviction and underlying acts after the court precluded the evidence on multiple occasions. Holloway's counsel made a motion for mistrial on this basis, claiming prejudice was evidenced by two jury questions about the bases of the prior convictions, one of which referred to the "propensity to commit a violent crime."

¶37 Before trial, the state filed a renewed motion to introduce character evidence pursuant to Ariz. R. Evid. 404(c) to show Holloway had an "aberrant sexual character" and consequent "propensity" to commit violent sexual assault, as demonstrated by his conviction for assaulting his former girlfriend L.T. The trial court denied the motion, but left open the possibility of using Holloway's assault of L.T. for impeachment.

¶38 When Holloway testified he "never hit" K.T., the state asked if he "hit women for sex." In the series of objections and rulings that followed, the court explicitly referred to the fact that Holloway had "taken the stand," and changed its ruling multiple times. When the state asked Holloway if his former girlfriend would testify that he beat women for sex, the court told the state to "move on" and instructed the jury to ignore the question; the state complied. Under these circumstances, the state's attempt at limited follow-up after Holloway denied hitting K.T. did not meet the definition of prosecutorial misconduct. The court did not err in denying Holloway's motion for mistrial.

Holloway's IV drug use

¶39 Holloway next claims it was improper for the state to present "testimony regarding Holloway being an IV drug user." He specifically complains the state elicited testimony from him about injecting drugs in 2008, and from K.T. about being forced to lick the plunger of a syringe containing a clear liquid. Holloway claims the state violated a stipulation and court ruling precluding "the allegation that Holloway was an IV drug user." He mischaracterizes the record.

¶40 The state notified Holloway it intended to call his former girlfriend to impeach his claim that he had never injected drugs and to show he lied to police in 2008. The court specifically precluded any reference to Holloway's 2008 domestic violence charge, but allowed the state to ask the former girlfriend about Holloway's past IV drug use. Holloway did not object to the girlfriend's testimony concerning drug use and did not cross-examine her.

¶41 As noted above, Holloway did not seek to preclude—and the court never prohibited—any and all reference to Holloway's drug use. The state asked Holloway if K.T.'s neighborhood was a "drug community," and used the terms "homelessness" and "drug users" exactly once each during closing arguments.[6]

¶42 The state complied with the court's ruling by avoiding the specific terms "homeless" and "IV drug user" and by not using related "colorable phrases" to directly disparage Holloway. We conclude it was not misconduct for the state to elicit the former

[6]In contrast, Holloway's attorney used the term "drug user(s)" five times; repeatedly referenced the terms "felons," "felony convictions," and "addiction(s)"; and further characterized the members of the "community" as "hungover" and "unreliable," commenting that they "can't function in society very well." In so arguing, counsel referred to the entire "community" including Holloway.

girlfriend's testimony given the stated purpose of impeaching Holloway by contradicting his claim never to have injected drugs.

Improper Argument

¶43 Finally, Holloway challenges the following statement from the state's rebuttal closing argument: "It is always my burden. It never shifts to them. But they have the same power of subpoena for witnesses and evidence that we do. Don't mistake that. They never have the burden, but they have the same power to get witnesses and test evidence as we do." Holloway argues that, in making this statement, the state improperly invited the inference "that the defense did not . . . have anyone to corroborate Holloway's testimony."

¶44 This statement does not refer to evidence not in the record and does not explicitly invite speculation as to any particular issue. If this statement indeed referred to the absence of corroborating evidence, it was not inaccurate given the fact that no one, not even Holloway, claimed to have personally witnessed LA attacking K.T. And any misstatement was cured by the state's repeated references to the proper burden of proof and the fact that the jury was properly instructed on the state's burden.

Cumulative Error

¶45 With respect to Holloway's claim that his right to due process was violated by multiple errors, we note that Arizona considers claims of cumulative error only with respect to "a claim that prosecutorial misconduct deprived a defendant of a fair trial." *State v. Hughes*, 193 Ariz. 72, ¶ 25, 969 P.2d 1184, 1190-91 (1998). Because we have found no such misconduct, we find no basis for a claim of cumulative error.

Jury Interrogatory

¶46 Holloway challenges the jury's failure to fill out an interrogatory, found on a separate page from the main verdict form, for simple assault based on his having choked K.T. The interrogatory asked the jury to specify the type of assault, specifically whether Holloway intentionally or knowingly had

caused physical injury to K.T. pursuant to A.R.S. § 13-1203(A)(1) or knowingly had touched her with intent to cause injury, insult, or provocation pursuant to § 13-1203(A)(3). The interrogatory was not mentioned when the clerk read the verdicts or during sentencing. Holloway argues the jury's failure to complete the interrogatory amounts to a non-unanimous verdict. Although Holloway did not object below, violation of a defendant's right to a unanimous jury verdict is fundamental error. *State v. Davis*, 206 Ariz. 377, ¶¶ 62-64, 79 P.3d 64, 77 (2003).

¶47 Holloway is entitled to a unanimous verdict as to the type of assault committed because the types of assault are different crimes with different punishments. *See* § 13-1203. His cursory citation to the fundamental error standard of review and authority that a non-unanimous jury verdict constitutes fundamental error arguably avoids waiver of this issue on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). He has failed, however, to meet his burden of demonstrating prejudice. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. In other words, he has not established that the jury would not have found him guilty of each of the possible crimes of assault. *See State v. Waller*, 235 Ariz. 479, ¶ 36, 333 P.3d 806, 817 (App. 2014) (finding lack of special verdict form harmless when defendant would have been found guilty on either theory of assault).

¶48 The injury to K.T.'s neck was not disputed, and was demonstrated through photographic evidence in addition to witness testimony. On this record, it would not be rational to find Holloway committed assault by choking K.T. but was not the source of her neck injury. The more reasonable inference is that the jury found Holloway caused all of K.T.'s physical injuries, and that they simply neglected to complete the interrogatory that accompanied the assault verdict form.

¶49 This case is loosely analogous to *State v. Gomez*, 211 Ariz. 494, ¶¶ 22-23, 123 P.3d 1131, 1136 (2005), in that both Holloway and Gomez claimed total innocence or mistaken identity. The court in *Gomez* confirmed that when a murder defendant claims total innocence as his only defense, "an erroneous jury instruction on premeditation does not take away a right essential to the defense"

and is therefore not fundamental error. *Id.* ¶ 27, *citing State v. Van Adams*, 194 Ariz. 408, ¶ 18, 984 P.2d 16, 23 (1999). Similarly, by resting his defense solely on total innocence, Holloway was not, by virtue of the jury's failure to complete the interrogatory, deprived of the right to defend on the basis that he did not injure K.T. and therefore only committed knowing touching without actual injury. *See* § 13-1203(A)(3). We conclude Holloway was not prejudiced by the jury's failure to complete the assault interrogatory.

Sufficiency of Evidence of "Serious Physical Injury"

¶50 Holloway claims there was insufficient evidence that K.T. suffered serious physical injury during the sexual assault. He moved for a judgment of acquittal on this count below, but did not address to the trial court the specific insufficiency that he now asserts. The argument is therefore ostensibly forfeited absent fundamental error, but conviction in the absence of sufficient evidence is fundamental error. *State v. Stroud*, 209 Ariz. 410, n.2, 103 P.3d 912, 914 n.2 (2005), *citing State v. Roberts*, 138 Ariz. 230, 232, 673 P.2d 974, 976 (App. 1983). We therefore review the facts in the light most favorable to sustaining the verdict, to determine whether there is sufficient evidence to support a finding beyond a reasonable doubt that the sexual assault involved serious physical injury. *See id.* ¶ 6.

¶51 The definition of sexual assault requires either "sexual intercourse or oral sexual contact" with the "penis, vulva, or anus." A.R.S. §§ 13-1401(A)(1), (4), 13-1406(A). "[I]f the sexual assault involved the intentional or knowing infliction of serious physical injury," the defendant may be subject to an enhanced, life sentence. § 13-1406(D). A "[s]erious physical injury" is one that "creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." A.R.S. § 13-105(39). Holloway argues both that K.T.'s physical injuries were not "serious" and that her injuries were not sufficiently connected to the sexual assault, as distinguished from Holloway's other offenses, because K.T. testified that the intercourse itself lasted only three minutes.

¶52 Holloway relies on *State v. Greene*, 182 Ariz. 576, 898 P.2d 954 (1995), for his argument about the timing of injury. The defendant in *Greene* grabbed the victim and beat her while dragging her thirty to fifty feet away from the sidewalk before sexually assaulting her. *Id*. at 577-78, 898 P.2d at 955-56. He then sexually assaulted her twice before kicking her in the face. *Id.* at 578, 898 P.2d at 956. The court concluded that the victim's serious injuries, which occurred "both before and after the sexual assaults," were related to the aggravated assault and kidnapping but not the sexual assaults. *Id.* at 581-83, 898 P.2d at 959-61.

¶53 The *Greene* court explicitly denied having "improperly injected a 'during' element into [its] interpretation of the 'involving' language," explaining that whether a serious injury was inflicted "'during'" a specific offense is "a factor weighing heavily in favor of finding that the offense was 'involving' the injury," but is not sufficient by itself, and is not an absolute requirement. *Id.* at 583, 898 P.2d at 961. "The injury must be closely related to the offense, included as a necessary accompaniment to the offense, though not necessarily a statutory element, or have an effect on the offense." *Id.* at 581, 898 P.2d at 959.

¶54 Here, in contrast to *Greene*, there was no clearly defined distinction between the sexual assault and the physical assault. It is not clear from K.T.'s testimony whether the beating stopped during the brief intercourse. Likewise, the evidence was sufficient to establish serious physical injury. The evidence showed Holloway repeatedly hit K.T. in the face, causing her eyes to swell shut, breaking her dentures and preventing her from speaking intelligibly; he permanently disfigured her finger by slamming the door on her hand when she attempted to escape the assault. These injuries met the definition of "serious physical injury." *See* § 13-105(39).

¶55 In light of these factors, we conclude the state presented sufficient evidence to support a finding that the sexual assault involved serious physical injury.

Disposition

¶56 For all the above reasons, we affirm Holloway's convictions and sentences.